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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 309(j) of the Communications Act - Competitive Bidding	)	PP Docket No. 93-253
	)	
Amendment of the Commission's Cellular-PCS Cross-Ownership Rule	)	GN Docket No. 90-314
	)	
Implementation of Sections 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Services	)	GN Docket No. 93-252

To: The Commission

RESPONSE OF COOK INLET REGION, INC.

Cook Inlet Region, Inc. ("CIRI"), by its attorneys, submits this response in the above-captioned proceeding. CIRI filed Comments with the Commission in response to the above-captioned Further Notice of Proposed Rule Making ("Further NPRM") adopted and released by the Commission on June 23, 1995.[1] In this response, CIRI addresses matters raised by the Sovereign Nation of the Oneida Tribe of Wisconsin ("Oneida Tribe") regarding inclusion of Indian gaming revenues in Tribal affiliation determinations that are beyond the scope of the Further NPRM.[2]

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1. 60 Fed. Reg. 34,200 (1995).

2. CIRI recognizes that the Commission has not invited Reply Comments in connection with the Further NPRM. CIRI offers this response, however, to clarify the record with regard to the unusual matters raised by the Oneida Tribe.

The Oneida Tribe questions the existence of a document that the Commission cites in its Fifth Memorandum Opinion and Order[3] in the spectrum auction proceeding.[4] The Commission refers to the subject document as "Cook Inlet ex parte comments, filed Oct. 31, 1994 . . . ."[5] The facts — as CIRI knows them — regarding the document are as follows.

In October, 1994, several members of Congress became concerned that the Commission might fail to follow the congressional policy embodied in the Tribal Affiliation Rule in developing its broadband PCS auction rules. At the request of those members, CIRI developed a memorandum regarding the treatment of the issue and delivered the document to the staff of several members of the Senate and the House of Representatives. The document apparently then was delivered to the Commission by the staff of one or more of those congressional offices.

CIRI does not believe that any of its employees or representatives delivered the document to the Commission at any time. However, CIRI cannot determine with certainty that this is the case. If the October 31 document was delivered to the Commission by a CIRI employee or representative, the failure to

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3. Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Fifth Memorandum Opinion and Order, 10 FCC Rcd 403, 428-429 (1994) ("Fifth Memorandum Opinion and Order").

4. Oneida Tribe Comments at 12-13. A copy of the subject document is attached.

5. Fifth Memorandum Opinion and Order, 10 FCC Rcd at 428-29 nn.103-06.

file an ex parte presentation notice was inadvertent. CIRI's course of practice has always been promptly to file notices of ex parte presentations in compliance with Part 1, Subpart H of the Commission's Rules. The lack of an ex parte presentation notice in this instance is consistent with CIRI's understanding that it did not submit the document to the Commission and does not evidence an effort to avoid public comment on the document or the contents thereof.[6]

The omission, in any event, was without prejudice to the Oneida Tribe. The nature and content of the October 31 document was treated in the Fifth Memorandum Opinion and Order and the Commission's reasoning based on the document was plain. In the wake of the Fifth Memorandum Opinion and Order, the Oneida Tribe could have challenged the Commission's determinations — or the very existence of the subject document — just as it has done here. It filed no such challenge, however.

Indeed, the Oneida Tribe's request to reconsider the gaming revenues provision comes long after the expiration of the period for reconsideration permitted by the Communications Act and the Commission's Rules. The Fifth Memorandum Opinion and Order was adopted by the Commission on November 10, 1994 and was released

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[6] Notwithstanding the Oneida Tribe's assertion to the contrary, the subject document correctly notes that the tribal exception to the Small Business Administration's affiliation rules was enacted by Congress in 1990. The reference to the year 1970 in the Fifth Memorandum Opinion and Order is a typographical error.

on November 23, 1994.[7] Public notice of the Fifth Memorandum Opinion and Order appeared in the Federal Register on December 7, 1994.[8] Thus, pursuant to Section 405(a) of the Communications Act and Section 1.429(d) of the Commission's Rules, petitions for reconsideration of the Fifth Memorandum Opinion and Order were due no later than January 6, 1995.[9]

Although six parties filed timely petitions for reconsideration of the Fifth Memorandum Opinion and Order with the Commission,[10] the Oneida Tribe was not among them. The details of the Oneida Tribe's concerns were as mature on January 6 as they were when the Tribe filed its pleading on July 7. The intervening six months and the Supreme Court's decision in Adarand Constructors, Inc. v. Pena added nothing to the Oneida Tribe's arguments. The Tribe could have addressed its concerns to the Commission in a timely manner. The fact of the Commission's subsequent Further NPRM does not alter the Oneida Tribe's failure to do so.[11]

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7. Fifth Memorandum Opinion and Order, 10 FCC Rcd at 403.

8. 59 Fed. Reg. 63,210 (1994). See 47 C.F.R. § 1.4(b)(1) (1994) (defining public notice in notice and comment rule making proceedings to mean the date of publication in the Federal Register).

9. 47 U.S.C. § 405(a); 47 C.F.R. § 1.429(d) (1994).

10. Public Notice: Petitions for Reconsideration of Action in Rulemaking Proceedings, PN 51719 (Jan. 20, 1995).

11. The Oneida Tribe asks the Commission to "journey onward" and "revoke the rule requiring rebuttal of the presumption of unfair competitive advantage from the presence of gaming revenues." Oneida Tribe Comments at 6, 16. In the Further NPRM,

Moreover, the very provision that is being criticized by the Oneida Tribe includes a mechanism to waive application of the rule in a given instance.[12] The Oneida Tribe does not appear to have availed itself of this alternative. The Tribe indicates that unique circumstances render it ineligible for the entrepreneurs' block auctions by only a narrow margin.[13] If that is so, the Tribe should pursue a waiver of the rule as expressly contemplated by the Commission.

Respectfully submitted,

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however, the Commission does not request comment on the gaming revenues provision in the Tribal Affiliation Rule. Instead, the Commission proposes measures to address legal uncertainties raised by the decision of the Supreme Court in Adarand. Further NPRM at ¶ 1. The gaming revenues provision was not called into question by the Adarand decision.

12. See 47 C.F.R. § 24.720(l)(11)(i) (waiver available if applicant "establishes that it will not receive a substantial unfair competitive advantage because significant legal constraints restrict the applicants ability to access such gross revenues").

13. Oneida Tribe Comments at 14-15.

PROPOSED RULE CHANGE

Summary

The proposal is narrowly drawn to allow tribes and Alaska Native Corporations (ANC's) to qualify under the Commission's affiliation rules. The change is drafted to exclude wealthy gaming tribes and all tribes which are not determined by the SBA to be disadvantaged.

The structure of the change is as follows:

- Indian gaming revenues are outside the tribal affiliation exemption (i.e. they are counted in the size determination);
- Application of the rule is limited to tribes/ANCs that can establish that they are "disadvantaged" (i.e. needy) under the SBA program.

DISADVANTAGED DETERMINATION BY THE SBA

Section 24.720(l)(11) is amended by inserting the words "and which are treated as disadvantaged by the Small Business Administration pursuant to 15 U.S.C. § 636(j)(10)(ii)" after the words "et seq".

GAMING REVENUE

Section 24.720(l)(11) is amended by adding at the end of the paragraph the words "provided that any revenues or assets derived from activities regulated under 25 U.S.C. 2701 et seq shall be included in any affiliate determination."

CONFORMING AMENDMENT

Section 24.720(l)(11) is amended by striking "For purposes of § 24.709,".

Section 24.720(l)(11) as amended would read as follows:

Indian tribes or Alaska Regional or Village Corporations organized pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601, et seq.) which are treated as disadvantaged by the Small Business Administration pursuant to 15 U.S.C. § 636(j)(10)(ii) or entities owned and controlled by such tribes or corporations, are not considered affiliates of an applicant owned and controlled by such tribes or corporations, provided that any revenues or assets derived from activities regulated under 25 U.S.C. § 2701 et seq shall be included in any affiliate determination.

Authority for Rules Change

The attribution rules at § 24.720(l)(11) should be further modified to provide for additional standards that will reduce the class of eligible participants and ensure that there is no abuse of the Commission's rules. The additional standards to be imposed include the elimination of gaming revenues and assets from coverage under the attribution rules and a requirement that tribes and ANC's be recognized as disadvantaged by the SBA.

Scope of Rules Change

The proposal is narrowly tailored to accomplish two specific purposes. First, revenues from and assets used in gaming activities would remain part of those tribal assets and revenues that are included in the Commission's attribution requirements. Second, tribes and ANCs would need to have disadvantaged status and, consistent with congressional intent, the Commission would consider this status in the application of preferences.

Gaming Revenues

The Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §2701 et seq, has provided certain tribes with a non-traditional source of revenue that is very substantial in many cases. Given the fact that gaming revenue is unequally distributed among tribes and ANC's, those revenues should be included in the Commission's attribution tests. Gaming revenues are not restricted to tribes in the way that other revenues are subject to legal and governmental controls. The free use of gaming revenues makes the overall revenues of certain tribes more comparable to the revenues of non-Indian entities.

Revenues from licenses issued to tribal entities pursuant to the authority of the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2701 et seq, are different in kind from other tribal assets in several respects: (i) they were not part of the original tribal assets, (ii) they were not part of the tribal economic picture when Congress enacted the SBA tribal affiliation rule in 1990, and (iii) they have the potential to concentrate immense wealth and unfairly skew the application of the tribal affiliation rule. Accordingly, as of the date of an application for Designated Entity status with the Commission, such revenues and assets attributable thereto should not be covered by the exemptions under the tribal affiliation rules.

Recognized Disadvantaged Status

The original authorizing legislation, P.L. 103-66, provides the Commission with broad authority to: (a) promote "economic opportunity", (b) "disseminate licenses among a wide variety of applicants, including small businesses owned by members of minority groups . . .", and (c) utilize "tax certificates, bidding preferences, and other procedures" to accomplish the above. Id. The Conference Report accompanying this legislation also supported the Commission's authority to assist disadvantaged parties

by expressly requiring the Commission to promote economic opportunity among historically disadvantaged groups. H.Conf. Rep. No. 213, 103d Cong., 1st Sess. (1993).

In addition, during the congressional consideration of Public Law 103-66, several tribes and ANCs testified before the House and Senate committees of jurisdiction (including the Senate Telecommunications Subcommittee that drafted the Budget Act language). Their testimony was used as the basis for drafting statutory language which allowed tribes and ANCs the ability to use preferences in the PCS auctions. The intent of Congress, is further reflected by: (1) the House Report on the FCC Authorization, and (2) the factual record established before Congress regarding the unique status and impediments to capital suffered by Indian tribes and Native Corporations. Such legislative history, while occurring after the enactment of the legislation authorizing spectrum auctions, is nonetheless germane to an implementing agency's determination of congressional intent. See H.R. Rep. No. 844, 103d Cong., 2d Sess. (1994). The implementing agency's interpretation of the statute, in turn, is subject to substantial deference.

In addition, the Commission is entitled to recognize that, in citing the use of tax certificates and other preferences in Public Law 103-66, Congress had in mind that some of the key historical users of these devices have been Indian tribes and Alaska Native Corporations. Congressional enthusiasm for tax certificates and other devices designed to assist disadvantaged parties has not waned since the passage of Public Law 103-66. In May 1994, the Subcommittee on Minority Enterprise of the House Small Business Committee held a hearing the lack of access to capital by minority entities and the use of tax certificates and other devices to overcome this barrier. Several Members of Congress, including the Chairman of the Communications Subcommittee of the Senate Commerce Committee, also recently wrote the Chairman of the FCC, to request that the Commission respect the congressional intention to provide for disadvantaged parties through the use of tax certificates and various bidding preferences.

SBA Affiliation Standards

The proposed rules change is integrated with an SBA "screen" for determining disadvantaged status. As a check on the fair application of the tribal affiliation rule, any applicant seeking to exempt an application under the tribal affiliation rule must demonstrate that it qualifies as a disadvantaged entity under the SBA rule. In crafting the standards of eligibility for the various programs that assist minorities, women, and small businesses, the Small Business Administration (SBA) has long been charged by the Congress to use a standard of economic or social disadvantage to determine eligibility for these various programs. The SBA standard has been applied to Indian tribes and ANC's at 15 U.S.C. § 636(j)(10(ii). The SBA has determined disadvantaged status for a number of Indian tribes and ANC's and it has established procedures for making that determination. 13 C.F.R. § 121.401(b).

The Commission properly looked to and borrowed from the Small Business Administration (SBA) regulations for definitions regarding small businesses, including the text of the SBA affiliation rules. The Commission further recognized that those rules, as well as a specific congressional enactment, required special consideration for the unique nature of Native American tribes and Native Corporations. See Order on

Reconsideration at § 3. Congress, in its enactment of the SBA affiliation standards, recognized that Indian tribes and ANCs are, in certain circumstances, deserving of disadvantaged status. 15 U.S.C. § 636(j)(10(ii). The adoption by the FCC of the SBA's standards should reflect that congressional determination and, therefore, the SBA's determination of disadvantage should be used to further the FCC's desire to narrowly tailor its tribal attribution rules.

Recognition of Tribes & ANCs

In implementing Public Law 103-66, the Commission properly defined minorities to include Native American, Alaska Natives (Section 24.720), and "businesses owned by members of minority groups" to include the tribal organizations mandated by Congress as the business form for most Native Americans (and Alaska Native Corporations for Alaska Natives). See Order on Reconsideration at § 3.

The Commission would act properly in recognizing that, in implementing the statute according to the proposed rules change, it has a direct fiduciary duty to Indian tribes and ANCs. The Indian Commerce Clause charges the Federal government with express, plenary authority regarding Indian tribes. U.S. Const., Art. 1, § 8. It is well-settled that the Federal government occupies a unique trust relationship with tribes and has a fiduciary obligation toward these quasi-sovereign entities. United States v. Antelope, 430 U.S. 641, 645 (1977); Morton v. Mancari, 417 U.S. 536, 555 (1974). See also Duro v. Reina, 495 U.S. 676, 692 (1990); Cotton Petroleum Corporation v. New Mexico, 490 U.S. 163 (1989).

CERTIFICATE OF SERVICE

I, Dottie E. Holman, hereby certify that the foregoing Response of Cook Inlet Region, Inc. and the attached document were delivered by hand to the following on July 12, 1995:

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